

DRAFT FUNCTIONAL ANALYSIS OF FAR CHANGES

(FACs 90-26 Through 90-31)

Prepared by Michael F. Miller, Director, Federal Acquisition Institute (FAI), in concert with the Acquisition Reform Communication Center (ARCC), Defense Acquisition University (DAU).

This draft will be updated as comments are received and further Federal Acquisition Circulars are issued related to the Federal Acquisition Streamlining Act.

Comments on this draft are welcome. Please submit comments by September 1, 1995, to any of the following:

- The FAI Home Page on the World Wide Web:
<http://www.gsa.gov/staff/v/training.htm>
- The DAU Home Page on the World Wide Web:
<http://www.acq.osd.mil/dau/dau.html>
- Internet e-mail to Michael.Miller@gsa.gov
or to hayessi@acq.osd.mil
- Fax to (202) 501-3341 (FAI) or (703) 379 4319 (ARCC)
- By mail or messenger to the Federal Acquisition Institute (VF), Room 4019, 18th. and F. Streets NW, Washington DC 20405 or to COL Sharolyn I. Hayes, Acquisition Reform Communications Center (ARRC), Defense Acquisition University (DAU), 2001 N. Beauregard St., Alexandria VA 22311-1772

Conventions:

Functions are described as performed by Federal contracting officers and specialists.

The *Contract Specialist Workbook* is a publication of the Federal Acquisition Institute (FAI), available from the FAI home page on the World Wide Web. This document provides detailed descriptions of the functions of Federal contracting officers and specialists. Office of Federal Procurement Policy letter 92-3 establishes the Workbook as a Governmentwide standard for training the contracting workforce.

A parenthetical reference is provided for each teaching point. Section numbers (e.g., §14.201-6) are from the Federal Acquisition Regulation (FAR). The related Federal Acquisition Circular (FAC) is identified by its number (e.g., FAC 90-29). The case number is that assigned to the particular rule.

POLICIES APPLICABLE TO ALL FUNCTIONS

Federal Acquisition System Vision, Standards, and Strategies

The Vision

Deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. View best value from a broad perspective, balancing the many competing interests in the System. The result is a system which works better and costs less.

Standards for Performance

No function is an end in itself. All functions are intended to accomplish the larger goals of the Federal acquisition system. Hence, when performing any given function, try to meet all of the following standards, taken together.

1. Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.

Principal customers are the users and line managers, acting on behalf of the American taxpayer. When performing any function, take into account the perspective of the user of the product or service. Be responsive and adaptive to customer needs, concerns, and feedback.

2. Minimize administrative operating costs.

To the extent that you are responsible for rules, policies, and procedures, question whether their benefits outweigh clearly exceed the costs of their development, implementation, administration, and enforcement. If not, alter or abolish them.

3. Conduct business with integrity, fairness, and openness.

An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly, each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public.

4. Fulfill public policy objectives.

Support the attainment of public policy goals adopted by the Congress and the President.

Strategies for Meeting System Standards

- *Shift the focus from “risk avoidance” to “risk management.”* The cost to the taxpayer of attempting to eliminate all risk is prohibitive.
- *Forecast requirements and develop long-range plans for accomplishing them.* Planning is a tool for the accomplishment of tasks, and application of its discipline should be commensurate with the size and nature of a given task. In carrying out such plans, however, be flexible in accommodating changing or unforeseen mission needs.
- *Team with other participants in the acquisition process.* Participants include not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.
- *Empower participants to make decisions within their area of responsibility.* Delegate authority to make decisions and the accountability for the decisions made to the lowest level within the System, consistent with law. In particular, the contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on a specific contract.
- *Encourage innovation and local adaptation where uniformity is not essential.*
- *If a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, assume that the strategy, practice, policy or procedure is a permissible exercise of authority.*
- *Communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace.*
- *Foster cooperative relationships between the Government and its contractors consistent with the Government’s overriding responsibility to the taxpayers.*
- *Maximize the use of commercial products and services in meeting Government requirements.*
- *Select contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.*
- *Promote competition.*
- *Provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member.* The contractor community is encouraged to do likewise.

Electronic Contracting Policies (General)

☞ To support paperless transactions, the FAR allows the use of electronic signatures. Moreover, the words “in writing” or “written”, as used in the FAR, do not necessarily refer to paper documents — the words apply equally to electronic files transmitted and stored on magnetic or optical media. (§2.101, FAC 90-29, Case 91-104)

☞ The FAR no longer requires contracting officers to make to reproduce paper copies and stamp those copies with the words “DUPLICATE ORIGINAL” — as being the only copies of executed documents that have the same force and effect as signed originals. (§4.101 and 4.201, FAC 90-29, Case 91-104)

☞ Agencies and the public may both computer generate standard and optional forms prescribed by the FAR if:

- The form is in an electronic format that complies with Federal Information Processing Standard Number 161, or
- There is no change to the name, content, or sequence of the data elements, and the form carries the Standard or Optional Form number and edition date. (§52.105, FAC 90-29, Case 91-104).

FUNCTION: Acquisition Planning

Contract Specialist Workbook, Unit of Instruction 2

(Look for changes related to acquiring commercial items).

FUNCTION: Funding

Contract Specialist Workbook, Unit of Instruction 4

☞ Contracting officers may execute service contracts (or an order under a task order contract or an option) for a period of performance that begins in one fiscal year and ends in the following fiscal year — with the contract entirely funded out of the first year's appropriations. This new authority will simplify the acquisition and administration of service contracts by allowing single, fully funded contract actions, in lieu of multiple contracts or complex obligation arrangements. However, the period of performance for the contract, order, or option so funded may not exceed twelve months.

Using this authority, for example, a contracting officer could write a contract for performance beginning on July 1, 1999 and ending on June 31, 2000 — and fund all work under the contract out of a fiscal year 1999 appropriation.

This new authority does not apply to the Department of Defense (DoD), United States Coast Guard, and the National Aeronautics and Space Administration (but see their FAR supplements for similar authorities). [§32.703-3 and 37.106, FAC 90-30, Case 94-766]

(Look for other changes related to new rules on multi-year contracting).

FUNCTION: Market Research

Contract Specialist Workbook, Unit of Instruction 5

(Look for changes related to acquiring commercial items).

FUNCTION: Requirements Documents

Contract Specialist Workbook, Unit of Instruction 6 (formerly “Specifications”)

(Look for changes related to acquiring commercial items).

FUNCTION: Commerciality Determination

New — (Look for changes related to acquiring commercial items).

FUNCTION: Sources

Contract Specialist Workbook, Unit of Instruction 9

Required Sources

☞ Contracting officers may use an “established electronic communications format” to place orders against Federal Supply Schedules. (§8.405-2, FAC 90-29, Case 91-104)

☞ Contracting officers may request supplies or services from a “JWOD participating nonprofit agency” in “writing” rather than by a “letter” request. That is, the request can be transmitted by electronic means rather than through the mails. (§8.705-3, FAC 90-29, Case 91-104)

Solicitation Mailing Lists

☞ Contracting officers do not have to maintain solicitation mailing lists when their electronic commerce software automatically transmits solicitations to all interested sources participating in electronic contracting with the contracting activity. (§14.205-1; FAC 90-29, Case 91-104)

☞ Whenever firms on a mailing list fail to submit an offer in response to a solicitation, the clauses at 52.214-9 and 52.215-15 require them to notify the contracting officer of their desire to continue receiving solicitations for such requirements. Absent such notice, the FAR allows contracting officers to strike their names from the mailing list. The FAR will now permit offerors to deliver the notice electronically rather than on paper. Moreover, contracting officers will not incorporate the clauses at 52.214-9 or 52.215-15 if they solicit offers through electronic data interchange methods that do not require the keeping of solicitation mailing lists. (§14.201-6, 15.407, 52.214-9 and 52.215-15; FAC 90-29, Case 91-104)

QBLs, QMLs and QPLs

☞ When a business concern not on the applicable QBL, QML, or QPL expresses interest in the acquisition, the contracting officer must forward the concern’s name and address to the agency activity which established the qualification requirement — whether or not the concern requested an actual copy of the solicitation. (§9.206-3, FAC 90-28)

FUNCTION: Competition Requirements

Contract Specialist Workbook, Unit of Instruction 12

Duties	1. Determine whether to conduct full and open competition after exclusion of sources. 2. Determine whether to conduct other than full and open competition.
Conditions	Given Purchase Requests and market data
Overall Standard(s)	Data from the requiring activity and/or market research are sufficient to justify restrictions on competition. Correctly identify which authority permits restricted competition. Correctly identify the approval requirements in accordance with FAR/agency procedures. Upon approval of the justification, obtain competition from as many responsible offerors as possible under the circumstances.

Exceptions to Full and Open Competition

☛ If a law enacted after the Streamlining Act directs awards to a contractor (or any other non-Federal entity), **IGNORE** that direction **UNLESS** the law **specifically**:

- Identifies the contractor (or other entity) **AND**
- References 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions **AND**
- States that award to that contractor shall be made “in contravention of the merit-based selection procedures” in 10 U.S.C. 2304(j) or section 303(h) of the Federal Property and Administrative Services Act of 1949.

Exceptions:

- Comply with statutory direction to continue work being performed by the specified contractor under a contract awarded prior to the Act.
- Comply with statutory requirements to contract with the National Academy of Sciences to “investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.”

Purpose: This is an anti-pork barrel provision. In the past, Congress often directed sole source procurements through hidden, obscure provisions of law (§6.302-5 Authorized or required by statute, FAC 90-31, Case 94-701)

☛ There is a new exception for acquiring the services of an expert for a current or “reasonably foreseeable” litigation or dispute. The Government may need their help when analyzing claims or requests for adjustments to contract terms and conditions. The Government also may need evaluators, fact finders, or witnesses for alternative dispute resolutions (ADR). Other potential users of this authority include the Internal Revenue Service (which may need this authority for such purposes as obtaining experts for

reviewing tax records) and the Equal Employment Opportunity Commission (for such purposes as obtaining state and local assistance for compliance audits).

More importantly, this exception allows the Government to essentially name request a neutral mediator or arbitrator for ADR who is agreeable to both parties.

However, this exception does not authorize contracting officers to disregard other policies and procedures applicable to contracting for such services, such as policies governing conflict of interest or restrictions on contracting for inherently governmental functions.

(§6.302-3 Industrial mobilization; engineering, developmental, or research capability; or expert services, FAC 90-31, Case 94-701) *See also “Publicizing Proposed Procurements” for a corresponding change to synopsis requirements.*

Full and Open Competition After The Exclusion Of Sources

☛ The following are additional reasons (over and above those previously in the FAR) for excluding a particular source to establish or maintain an alternative source or sources.

- Ensure the continuous availability of a reliable source of supplies or services.
- Satisfy projected needs based on a history of high demand.
- Satisfy a critical need for medical, safety, or emergency supplies.

The Government is getting out of the business of buying and warehousing large stocks of supplies for contingencies. Instead, the Government is moving to a lean logistics support capability and Just In Time delivery. For example, DoD is planning to buy tires from suppliers when needed rather than stockpiling the tires. However, this means keeping a stable of suppliers who are ready, willing, and able to quickly ramp up production to meet a surge in demand (e.g., Desert Storm). (§6.202 Establishing or maintaining alternative sources, FAC 90-31, Case 94-701)

Justifications for Other Than Full and Open Competition

☛ Those who can approve a justification over for a proposed contract over \$1,000,000 can also approve a justification for a proposed contract under that dollar amount. (§6.304 Approval of the justification, FAC 90-31, Case 94-701)

(Look for other changes related to acquiring commercial items).

FUNCTION: Price-Related Evaluation Factors

Contract Specialist Workbook, Unit of Instruction 15

Duty	Select price-related factors for incorporation in the solicitation.
Conditions	Given purchase requests, acquisition histories, and market data.
Overall Standard(s)	Incorporates all price-related factors necessary to detect that offer, or that combination of offers, which would result in the lowest total cost to the Government over the life of the deliverable.

Options as a Price-Related Factor

☞ Options may be used as an evaluation factor only if the contracting officer determines that there is a reasonable likelihood that the options will be exercised. When soliciting sealed bids, put this determination in writing. This change in policy is in response to complaints from small businesses about having been asked to price options that all too often are not exercised. (§17.202 and 17.208, FAC 90-31, Case 94-701)

(Look for other changes related to acquiring commercial items).

FUNCTION: Non-Price Evaluation Factors

Contract Specialist Workbook, Unit of Instruction 16 (formerly “Technical Evaluation Factors”)

Duties	<ol style="list-style-type: none"> Determine whether award will be made to the offeror: <ul style="list-style-type: none"> Whose offer represents the “greatest value”, or Whose offer meets the solicitation's minimum criteria for acceptable <u>award at the lowest cost or price.</u> Critique proposed past performance, quality, environmental, and other non-price evaluation factors (along with the corresponding proposal instructions) and, for “greatest value” competitions, critique the proposed rating/scoring methodology.
Conditions	Given acquisition histories, market data, purchase requests, requirements documents and/or the statement of work.
Overall Standard(s)	As written by the requiring activity after review by the Contract Specialist, evaluation factors and, for “greatest value” competitions, rating/scoring methodologies, are reliable (using the factors independently from one another, technically competent individuals would evaluate the same proposal consistently) and valid (factors are in fact predictive of ability to satisfy the Government's minimum needs).

Past Performance and Quality

☞ Contracting officers must evaluate “past performance” in every competitive negotiation if the estimated value of the requirement exceeds:

- \$1,000,000 for solicitations issued on or after July 1, 1995.
- \$500,000 for solicitations issued on or after July 1, 1997
- \$100,000 for solicitations issued on or after January 1, 1999.

Exception: You do not have to evaluate past performance if the contracting officer documents the rationale for disregarding past performance in the contract file. [§15.605, FAC 90-26]

☞ Contracting officers must also consider quality in **every** source selection, through inclusion in one or more non-price factors (e.g., past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance). [§15.605, FAC 90-26]

☞ Cognizant technical officials are responsible both for technical and past performance requirements related to the source selection process. (§15.604, FAC 90-26)

☞ Generally speaking, agency officials have broad discretion when determining the sources and types of past performance information to evaluate — which should be tailored to the circumstances of the acquisition. (§15.608, FAC 90-26)

☞ When you plan to evaluate past performance, the solicitation shall afford an offeror the opportunity to identify existing or past contracts awarded to the offeror that are similar in nature to the proposed terms and conditions of the solicitation. Contracting officers also may invite the offerors to provide information on problems encountered during performance of existing or past contracts and on the steps being taken by the offerors to correct the problems. (§15.608, FAC 90-26)

☞ You may instruct offerors to package and submit past performance data separate and apart from pricing information and, if needed, technical data. (§15.406-5 Part IV, FAC 90-26).

Environmental Objectives

☞ Contracting officers must consider “environmental objectives” in every source selection “where appropriate”. Possible objectives: “promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content” [§15.605, FAC 90-27]

Award On Low Price or Cost

☞ The FAR reaffirms that contracting officers may continue to award contracts, where appropriate, on the basis of lowest [evaluated] price or cost to responsible offerors whose offers meet the solicitation’s minimum criteria for acceptable award. Remember to state this basis of award in the solicitation. (§15.605, FAC 90-31, Case 94-701)

☞ When awarding on the basis of lowest evaluated price or cost with consideration limited to offers that satisfy the solicitations’ minimum criteria for acceptable award, generally you may NOT use responsibility-related factors (e.g., past performance) other than for responsibility determinations. Such responsibility determinations are subject to “Certificate of Competency” review by the Small Business Administration. In best value source selections, a comparative assessment of past performance is distinct and different from the responsibility determination under FAR §9.103 and not subject to “Certificate of Competency” reviews. (§15.608, FAC 90-26).

Incorporating Evaluation Factors in RFPs

☞ Numerical weights are NOT mandated (or encouraged) by the FAR. However, the FAR reaffirms that numerical weights can be used — and do not necessarily have to be disclosed in the RFP. Contracting officers may disclose numerical weights “on a case by case basis” in the solicitation. Although the new FAR language does not discourage this practice, disclosing weights generally is NOT good practice. The Comptroller General has repeatedly ruled that Source Selection Authorities have discretion to overrule

numerical scores when weights are NOT disclosed in the solicitation. (§15.605, FAC 90-31, Case 94-701)

☞ Contracting officers must state **all significant** evaluation factors and subfactors in requests for proposals. (§15.406-5 and §15.605(d), FAC 90-31, Case 94-701)

☞ RFPs must directly, expressly state whether:

Non-Price evaluation factors (taken as a whole) are ...	}	<ul style="list-style-type: none">• Significantly more important than, or• Approximately equal in importance to, or• Significantly less important than ...	}	Cost or price.
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Insert this language as the prelude in Section M (when using the UCF). (§15.605, FAC 90-31, Case 94-701)

(Look for other changes related to new rules on acquiring commercial items).

FUNCTION: Method of Procurement

Contract Specialist Workbook, Unit of Instruction 17

Duty	Determine the method of procurement: <ul style="list-style-type: none">• Simplified acquisition procedures• Sealed bidding• Two-step sealed bidding• Award on competitive proposals.
Conditions	Given Purchase Requests, data from market research, and source lists
Overall Standard(s)	Select sealed bidding when all of the following are true: <ul style="list-style-type: none">• The requirement exceeds the small purchase limitation and cannot be met by ordering against an existing contract.• Time permits the solicitation, submission, and evaluation of sealed bids.• Award will be made on the basis of price and other price-related factors.• There is no need to conduct discussions with the responding offerors about their offers.• There is a reasonable expectation of receiving more than one sealed bid.

☞ When award will be on the basis of competitive proposals, determine whether to incorporate the award clause at FAR 52.215-16 with or without Alternate II. Generally reserve the right to award without discussions by using Alternate II. The advantage of Alternate II: Initial proposals are likely to be more realistic. Use the clause without the Alternate when discussions are clearly inevitable (e.g., when the contemplated contract type is cost reimbursable). (§15.407 Solicitation provisions and §52.215-16 Contract Award, FAC 90-31, Case 94-701)

(Look for other changes related to acquiring commercial items).

FUNCTION: Selecting the Type of Contract to Solicit

Contract Specialist Workbook, Unit of Instruction 19.1

Duty	Select the contract type or types to solicit.
Conditions	Given acquisition histories, market data, and the purchase request.
Overall Standard(s)	<p>Correctly identify the factors in pricing a procurement that are the most uncertain, determine the potential risks entailed by the uncertainties, and select the type of contract that will:</p> <ol style="list-style-type: none">1. Minimize the potential risks (in terms of cost and performance) inherent in the requirement and the expected cost of contract administration (both to the Government and industry), taken together.2. Provide a reasonable allocation of risk between the Government and the contractor.3. Conform to FAR Parts 12 and 16 and agency requirements and limitations on the use of the different contract types. <p>Do not use cost-plus-a-percentage-of-cost contracts.</p> <p>When contracting for commercial items under FAR Part 12, only award firm fixed price contracts and fixed price contracts with economic price adjustment.</p>

☞ D&Fs are no longer required for cost reimbursable contracts or fixed price incentive contracts. Sections 1021 and 1071 of the Streamlining Act repealed the requirement for Secretarial/Agency Head determinations regarding use of cost type or incentive contracts. Therefore, the FAR at 16.301-3, 16.403, 16.403-1, and 16.403-2 has been amended to delete the requirement. (FAC 90-24)

☞ The FAR now permits contracting officers to sign the determinations and findings that are still required to establish the basis for application of the statutory price or fee limitation in cost-plus-fixed-fee contracts. Previously, the FAR delegated this authority to the “agency head or designee.” (§16.306, FAC 90-30, Case 94-700)

(Look for other changes related to new rules on acquiring commercial items and establishing task order contracts).

FUNCTION: Contract Financing

Contract Specialist Workbook, Unit of Instruction 21

(Look for changes related to new rules for financing acquisitions of commercial and non-commercial items).

FUNCTION: Use Of Government Property And Supply Sources

Contract Specialist Workbook, Unit of Instruction 22

Part C: Government Sources Of Supply

Duty	Determine whether to authorize contractors to use Government supply sources.
Conditions	Given the availability of Government sources of supply.
Overall Standard(s)	<p>Authorize use for contracts under the Javits-Wagner-O'Day Act, when:</p> <ul style="list-style-type: none"> • The nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and • The supplies or services received are directly used in making or providing a commodity or service approved by the Committee for Purchase From People Who Are Blind or Severely Disabled to the Federal Government. <p>For other contracts, correctly determine whether the use of Government supply sources can be authorized. If Government supply sources may be used, authorize use if the supplies are necessary for timely contract performance and:</p> <ul style="list-style-type: none"> • Government is the only source, or • The total cost to the Government would be less than the cost of having the contractor use other sources.

☞ Nonprofit agencies for the blind or severely disabled may use Government supply sources in performing contracts under the Javits-Wagner-O'Day Act, if:

- The nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and
- The supplies or services received are directly used in making or providing a commodity or service approved by the Committee for Purchase From People Who Are Blind or Severely Disabled to the Federal Government (§51.101 and §51.102, FAC 90-31, Case 94-701).

FUNCTION: Solicitation Preparation

Contract Specialist Workbook, Unit of Instruction 24

Duties	<ol style="list-style-type: none">1. Select and complete provisions and clauses for solicitations.2. Tailor or draft provisions and clauses, where appropriate.3. Assemble and prepare solicitations for issuance.
Conditions	Given Purchase Requests, acquisition histories, data on the market, and presolicitation business decisions from Units 6 through 23.
Overall Standard(s)	<p>Select the format appropriate for the acquisition (e.g., the combined CBD synopsis/solicitation or SFXXX for commercial items). Incorporate all clauses and provisions required for the procurement, given prior decisions on whether the requirement is for a commercial item, method of procurement, type of contract, nature of goods or services being procured, method of procurement, et. al. Select or draft other terms and conditions that represent a net benefit in terms of improving the probability of attaining the Government's minimum needs on-time and at a fair and reasonable price.</p> <p>Except as otherwise directed by FAR Part 12, only incorporate terms and conditions in FAR Part 12 solicitations for commercial requirements that are consistent with customary commercial practice for the market. Where permitted, tailor Part 12 clauses and provisions to more closely reflect commercial practices.</p>

☞ Contracting officers can solicit bids and proposals electronically and permit contractors to submit bids and proposals electronically. When preparing a solicitation authorizing electronic offers, specify the electronic commerce method(s) that bidders may use. Also consider the impact of electronic data interchange on the time reasonably needed by offerors to prepare and submit offers — electronic commerce should speed up the process of preparing and submitting offers. (§14.202-1, 14.202-2, 14.202-8, and 14.203-1; FAC 90-29, Case 91-104).

☞ The Federal Acquisition Streamlining Act repealed the requirement that "every contract or agreement" express the condition that certain officials shall not benefit from the award of that contract or agreement. This condition had been expressed in FAR clause 52.203-1. The clause has been deleted, along with the related statements of policy in FAR 3.102 through 3.102-2. The criminal provisions found at 18 U.S.C. 431 and 432 remain in effect. (§3.102 through 3.102-2 and 52.203-1, FAC 90-30, Case 94-802)

(Look for other changes related to acquiring commercial items).

FUNCTION: Publicizing Proposed Procurements

Contract Specialist Workbook, Unit of Instruction 25

Duty	Select and implement a method or methods of publicizing the proposed procurements.
Conditions	Given a proposed solicitation and market data
Overall Standard(s)	Market notified to extent required and necessary for obtaining competition for prime contracts and to offer subcontracting opportunities to small businesses.

☞ There is an exception to synopsis requirements when the contract action is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute. (§5.202 and §5.301, FAC 90-31, Case 94-701) *See also "Competition Requirements."*

☞ No synopsis will be required for actions up to \$250,000 made through a certified FACNET after Governmentwide FACNET has been certified. Until then, no synopsis is required for any action over \$25,000 through the Simplified Acquisition Threshold (\$100,000) which is made through a certified FACNET. (§5.202, FAC 90-29, Case 94-770)

☞ If a small business concern requests a copy of an electronically disseminated solicitation, you may e-mail the copies to the concern's electronic address. (§5.102, FAC 90-29, Case 91-104)

☞ When solicitations are made available through electronic data interchange, the CBD synopsis must provide the information necessary to obtain the solicitation (e.g., electronic address and downloading instructions) and respond to it. (§5.207, FAC 90-29, Case 91-104).

(Look for other changes related to acquiring commercial items).

FUNCTION: Amending Solicitations

Contract Specialist Workbook, Unit of Instruction 28

☞ Contracting officers may use electronic data interchange to notify prospective offerors of any change to the closing date for submitting proposals. (§15.410, FAC 90-29, Case 91-104)

FUNCTION: Cancelling Solicitations

Contract Specialist Workbook, Unit of Instruction 29

☞ When canceling an IFB before opening, do not let anyone view electronic bids. Purge each bid and all related data received from the bidder from all data storage systems — both primary and backup. (§14.209; FAC 90-29, Case 91-104)

FUNCTION: Processing Bids

Contract Specialist Workbook, Unit of Instruction 30

☞ Keep electronic bids in a “secured, restricted-access electronic bid box” prior to opening. (§14.401; FAC 90-29, Case 91-104)

☞ If you have reason to believe that electronic bids from “an important segment of bidders” were lost because of problems with the Government’s telecommunications equipment or servers (e.g., power outages or software bugs), consider postponing bid opening so that bidders can electronically resubmit their bids. (§14.402-3; FAC 90-29, Case 91-104)

☞ IFBs may allow bidders to modify or withdraw bids by electronic messaging. If a bidder withdraws an electronic bid, purge the bid and all related data from all data storage systems — both primary and backup. . (§14.303; FAC 90-29, Case 91-104)

☞ When conducting a cost comparison, the cost estimate for Government performance can be provided either in a sealed dated envelope or an electronic equivalent. (§7.304, FAC 90-29, Case 91-104)

FUNCTION: Late Offers

Contract Specialist Workbook, Unit of Instruction 32

☞ If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” bids or proposals. (§14.304-1, 52.214-7, 52.214-23, 52.214-32, 52.214-33, 52.215-10, and 52.215-36; FAC 90-29, Case 91-104)

FUNCTION: Responsiveness

Contract Specialist Workbook, Unit of Instruction 34

Duty	Determine responsiveness to the IFB.
Conditions	Given an IFB and sample bids.
Overall Standard(s)	The apparent low bid complies in all material aspects with the IFB; all minor informalities/irregularities are corrected or waived.

☞ For an electronic bid to be responsive, the bidder must use the electronic commerce method specifically stipulated or permitted by the IFB. (§14.301 and 52.214-5; FAC 90-29, Case 91-104)

☞ Reject “unreadable” electronic bids unless the bidder provides clear and convincing evidence:

- Of the content of the bid as originally submitted; and
- That bid is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling. (§14.406; FAC 90-29, Case 91-104)

An electronic bid is unreadable if you cannot determine whether the bid is responsive (i.e., whether it conforms to the essential requirements of the IFB).

☞ To be responsive, bids must offer a delivery date no later than that required by the IFB. If the contractor offers a delivery date that is “X days following my receipt of the contract or notice of award”, contracting officers compare that offered date to the required date. For this purpose, the FAR has long instructed contracting officers to add 5 days to the date of contract award to account for time required by the Post Office to deliver notice of award through the ordinary mail. Now, the FAR instructs contracting officers to add only one day if notice of award is transmitted electronically. (§12.103, §52.212-1, §52.212-2, FAC 90-29, Case 91-104)

(Look for other changes related to acquiring commercial items).

FUNCTION: Processing Proposals

Contract Specialist Workbook, Unit of Instruction 35

Duties	<ol style="list-style-type: none">1. Safeguard, open, and record proposals.2. Identify variances from the RFP's terms and conditions.3. Select reviewers and assign responsibility for analyzing the proposals.
Conditions	Given an RFP and the offers.
Overall Standard(s)	Correctly identify all potential areas of discussion (i.e., variances from the RFP's terms and conditions). Correctly distinguish "minor irregularities and informalities" from differences requiring discussion. Following the closing date for proposals, immediately exclude (and notify the offerors of such exclusion) proposals from the competitive range that cannot be considered (e.g., offers of items that do NOT meet or exceed the level of commercial or Government market acceptance specified in a FAR Part 12/15 request for proposals to supply commercial items).

✎ Reject offers submitted by electronic commerce unless the offeror used an electronic commerce method specifically stipulated or permitted by the solicitation. (§52.215-9; FAC 90-29, Case 91-104)

✎ If an electronic proposal is “unreadable”, immediately notify the offeror and provide the offeror with an opportunity to submit clear and convincing evidence:

- Of the content of the proposal as originally submitted; and
- That the proposal is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling.

An electronic proposal is unreadable if you cannot determine whether it conforms to the essential requirements of the solicitation. (§15.607; FAC 90-29, Case 91-104)

✎ If an offeror withdraws an electronically transmitted proposal, purge the proposal and all related data from all data storage systems — both primary and backup. . (§15.412; FAC 90-29, Case 91-104)

✎ When conducting a cost comparison, the cost estimate for Government performance can be provided either in a sealed dated envelope or an electronic equivalent. (§7.304, FAC 90-29, Case 91-104)

(Look for other changes related to acquiring commercial items).

FUNCTION: Applying Past Performance, Technical, And Other Non-Price Factors

Contract Specialist Workbook, Unit of Instruction 36

Part A: Surveying Past Performance

Duty	Survey other customers of the offeror
Conditions	Given the solicitation, proposals, and information from the offeror and other sources on past and current customers of the offeror
Overall Standard(s)	<p>Survey questions are designed to collect consistent (from one offeror to the next), reliable and valid data for applying the past performance evaluation factors (price and non-price) stated in the solicitation.</p> <p>When conducting surveys, do not disclose source selection information, such as information on other offerors or on the contents of proposals.</p> <p>Before applying past performance information, provide the offeror an opportunity to discuss information obtained from the customers (but never reveal the names of individuals who provided the past performance information).</p> <p>When developing an overall judgment on the offeror's past performance, consider such factors as:</p> <ul style="list-style-type: none"> • The number and severity of an offeror's problems, in relation to the offeror's overall work record • The age and relevance of past performance information. • Potential bias on the part of any given customer (e.g., whether the customer is a potential competitor of the offeror for other requirements) • The extent to which poor performance by an offeror on a past contract may have been as much or more the fault of the customer • Differences in requirements between the current solicitation and contracts with the customer (e.g., differences in the level of technical and performance risk) • The extent to which the offeror has taken measures to correct past problems (e.g., are ratings improving with time?) • Survey-related bias (e.g., the "halo" effect). <p>Provide sufficient documentation for the file to demonstrate that the Government's evaluation of past performance was fair, impartial, and reasonable given available data.</p>

☞ Contracting officers may obtain information on the past performance of an offeror from sources other than the offeror. This includes any source (public or private sector) known to the Government. In particular, obtain information from contracting activities anywhere in the Government which have evaluated an offeror's performance as prescribed in FAR Part 42.15. (§15.608, FAC 90-26)

☞ When evaluating past performance information, consider such issues as:

- The number and severity of an offeror's problems,
- Effectiveness of corrective actions taken by the offeror,

- The offeror's overall work record.
- Age and relevance of past performance information.

(§15.608, FAC 90-26)

☞ Assign a neutral evaluation for past performance to any offeror which lacks relevant past performance history. (§15.608, FAC 90-26)

(Look for other changes related to acquiring commercial items).

FUNCTION: Pricing Information From Offerors

Contract Specialist Workbook, Unit of Instruction 38 (formerly "Cost or Pricing Data")

(Look for changes resulting from new rules on the Truth in Negotiations Act).

FUNCTION: Audits

Contract Specialist Workbook, Unit of Instruction 39

Requesting Audits

☞ When reviewing proposed indirect costs, ask the cognizant audit office to determine whether any audits completed during the preceding 12 months addressed those costs. Do not request a new audit of the proposed indirect costs if information from the prior audits is adequate for determining the reasonableness of those costs. [§15.805-5, FAC 90-31, Case 94-740]

Flowdown of Audit Rights

☞ Prime contractors are required to incorporate the audit and records clause at FAR 52.214-26 only in those subcontracts expected to exceed the threshold at 15.804-2(a)(1) for submission of cost or pricing data. Previously, prime contracts had to incorporate such clauses in any subcontract over \$10,000. (§52.214-26, FAC 90-31, Case 94-740)

☞ Contractors only have to incorporate the audit and records clause at 52.215-2 in subcontracts that exceed the simplified acquisition threshold and:

- That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;
- For which cost or pricing data are required; or
- That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

This conforms the audit rights at the subcontract level with those at the prime contract level. (52.215-2; FAC 90-31, Case 94-740)

Record Keeping Requirements

☞ The FAR redefines the term “records” to include not only books and documents but also “accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.” (§4.703, 52.214-26, and 52.215-2; FAC 90-31, Case 94-740)

☞ Contractors and subcontractors do NOT have to maintain or produce original records for Government audits if they provide photographic or electronic images of the original records AND all of the following are true: (§4.703, FAC 90-31, Case 94-740)

- Electronic records include all significant information from paper originals.
- The imaging process preserves accurate images of the original records, including signatures and other written or graphic images.
- The imaging process is sufficiently reliable and secure to maintain the integrity of the original records.
- An effective indexing system permits timely and convenient access to the imaged records.
- The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

GAO Access to Records

☞ The Comptroller General’s right of access to contractor records is established by the clauses at 52.214-26 and 52.215-2 — the clause at 52.215-1 is reserved. The clause at 52.215-2 also stresses that this right of access “may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law”. (§4.702, 15.106-1, 25.901, 52.214-26, and 52.215-2, FAC 90-31, Case 94-740)

☞ A new Alternate III to the clause at FAR 52.215-2 waives the Comptroller General’s right to examine the records of foreign contractors. Do not automatically waive that right. Rather, the FAR requires every reasonable effort to negotiate incorporation of the “basic” clause at FAR 52.215-2 with the Comptroller’s right of access intact — and the FAR maintains essentially the same controls on waivers that formerly applied to decisions about omitting the clause at 52.215-1. (§25.901 and 52.215-2; FAC 90-31, Case 94-740).

FUNCTION: Price Analysis

Contract Specialist Workbook, Unit of Instruction 34

(Look for changes resulting from new rules related to the Truth in Negotiations Act and small business policies).

FUNCTION: Competitive Range

Contract Specialist Workbook, Unit of Instruction 42

Duties	<ol style="list-style-type: none">1. Determine whether discussions are necessary.2. If necessary, establish the competitive range.
Conditions	Given the RFP, proposals, technical reports, and cost/price analysis reports.
Overall Standard(s)	<p>Conducts discussions whenever the RFP includes the provision at FAR 52.215-16 absent Alternate II. If RFP includes Alternate II, only conduct discussions if necessary and document the rationale in the contract file.</p> <p>When establishing the competitive range, exclude proposals which do not have a reasonable chance of selection for award. For example, exclude a proposal that is susceptible of being made technically acceptable through discussions—if, relative to other acceptable offers, it has no reasonable chance of being awarded the contract (e.g., if its technical score is far lower than that of the next higher-scoring offeror and its price is higher than that of any of the offerors in the competitive range).</p>

☞ For civilian agencies, FAR 52.215-16, Alternate II, expands the Government’s right to award without discussions. Under the previous award clause at 52.215-16, the Government’s right to award without discussions had been greatly limited in case law. Basically, the Comptroller General only allowed award without discussions when (1) the RFP provided for award to the lowest priced offer in the competitive range and (2) the contracting officer had no reason to believe that discussions would yield a better price. Now, you can award without discussions even in “greatest value” competitions and trade-off the costs of conducting discussions against the possibility of seeing some slight improvement in BAFO prices vis-à-vis those initially proposed.

For DoD, NASA, and Coast Guard, the new Alternate II replaces the prior Alternate III — with no essential change in language. The language of the former Alternate II is now part of the basic provision.

(§52.215-16 Contract Award , FAC 90-31, Case 94-701)

☞ If the RFP included FAR 215-16 **absent** Alternate II, establish a competitive range and conduct discussions with all offerors in the competitive range.

If Alternate II was incorporated, determine whether discussions are necessary. If necessary, document the reasons in the contract file. The new FAR language provides no examples of circumstances under which discussions might be necessary. Among the potential reasons for conducting discussions:

- No proposal is technically acceptable.
- Only one proposal is technically acceptable, because other offerors appear to have misinterpreted the RFP's requirements.
- All prices appear to be unreasonably high, compared with prior prices or current market prices for like deliverables.
- The lowest offered price appears to be unrealistic (e.g., the product of a potential cost estimating mistake) when compared with the Government estimate.
- All prices are unrealistically low.

(15.610 Written or oral discussion , FAC 90-31, Case 94-701)

FUNCTION: Negotiation

Contract Specialist Workbook, Unit of Instruction 45

Duty	Conduct a negotiation session and prepare the Price Negotiation Memorandum (PNM). <ul style="list-style-type: none">• In a sole source situation.• As part of a competitive negotiation.• As part of a post award negotiation (e.g., a contract modification).
Conditions	Given an RFP, proposals, analysis reports, prenegotiation plan, and the prenegotiation strategy.
Overall Standard(s)	<p>Select and correctly apply tactics to accomplish the Government's negotiation strategy, resulting in:</p> <ul style="list-style-type: none">• A best and final offer that accomplishes the Government's highest priority objectives for the negotiation, or• An agreement with a sole source supplier that accomplishes the Government's highest priority objectives for the negotiation. <p>In competitive negotiations, comply with FAR 15.610(d)—no technical leveling, no technical transference, and no auctioning. Only disclose information to participants in discussions that may be disclosed under FAR 15.413.</p> <p>In writing the PNM, identify and discuss all negotiation issues in sufficient detail to allow accurate reconstruction of the procurement for immediate review and future reference. The PNM must fully support the recommendation for award.</p>

✋ During discussions, provide an offeror the opportunity to discuss past performance information not previously made available to the offeror for review and comment. This does NOT apply to information on past performance collected under FAR 42.15 — unless the contracting activity had failed to provide contractors with opportunities to review and comment on the past performance records as required by that FAR section.

During discussions, DO NOT disclose the names (or other identifiers) of individuals which provided reference information on the offeror's past performance. (§15.610, FAC 90-26)

(Look for changes related to Price Negotiation Memoranda resulting from new rules on the Truth in Negotiations Act).

FUNCTION: Mistakes in Offers

Contract Specialist Workbook, Unit of Instruction 46

☞ When correcting apparent clerical mistakes in electronic bids, include as part of the electronic solicitation file:

- The original bid
- The verification request
- The bid verification.

(§14.407-2; FAC 90-29, Case 91-104)

FUNCTION: Responsibility

Contract Specialist Workbook, Unit of Instruction 47

Duty	Determine and document the responsibility or nonresponsibility of a prospective contractor.
Conditions	Given a solicitation, several offers, the List of Parties Excluded From Procurement and non-Procurement Programs, and the results of market research and acquisition histories
Overall Standard(s)	Awards contracts only to those firms which are reasonably certain of being capable of effective performance in compliance with all terms and conditions of the contract.

☞ Before awarding a contract, contracting officers must check the “List of List of Parties Excluded from Federal Procurement **and Nonprocurement Programs.**” Organizations suspended, debarred, or otherwise excluded from “nonprocurement transactions” are now also ineligible for Federal contracts and vice versa. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. (§9.4, FAC 90-28)

Historically, the General Services Administration maintained two separate lists of parties that are prohibited from receiving Government contracts (the Procurement List) and benefits such as grants and cooperative agreements (the Non-Procurement List). Parties on the Non-Procurement List were eligible to receive contracts as long as their names were not also on the Procurement List, and vice versa. Starting on August 25, 1995, newly initiated suspension and debarment actions will have apply equally to procurement and nonprocurement transactions if the Agency Debarring Official issues an appropriate notification letter.

In the near future, however, GSA will maintain three lists until all suspensions and debarments have Governmentwide effect on both procurement and nonprocurement transactions. Eventually, there will only be one unified reciprocal list.

☞ Contracting officers must consider “relevant past performance information” collected pursuant to subpart 42.15. However, contracting officers may not call a vendor “nonresponsible” solely on the basis of a lack of relevant performance history “except as provided in 9.104-2”. (§9.104-2, FAC 90-26).

(Look for other changes related to acquiring commercial items).

FUNCTION: Award

Contract Specialist Workbook, Unit of Instruction 50

Duty	Award the contract.
Conditions	Given the completed contract and related documentation
Overall Standard(s)	The contract is properly approved, signed, and executed. Make all required notifications.

☞ Notify unsuccessful offerors within three days after award. Consider notification by registered mail, with return receipt requested, or E-Mail with automatic return receipt, or fax if your fax software or hardware verifies receipt by the receiving fax station. For the purpose of this section, “day” means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday. (§14.409-1, §15.1002, §25.405, and §36.304, FAC 90-31, Case 94-701)

☞ Contracting officers can use electronic rather than paper medium to transmit preaward notices, postaward notices, and notices of award. (§14.408-1, §14.409-1, Subpart 15.10, and §36.304; FAC 90-31, Case 94-701)

☞ There are new FPDS reporting fields for awards to small disadvantaged business, women owned business concerns, number of offers, award of task order contracts, and awards for commercial items. OFPP is revising the form. (§4.601, FAC 90-31, Case 94-701)

FUNCTION: Debriefing

Contract Specialist Workbook, Unit of Instruction 51

Duty	Identify deficiencies in the offer, cull out materials not to be disclosed, and debrief unsuccessful offerors.
Conditions	Given the solicitation, PNM, technical evaluations, source selection reports, and proposals.
Overall Standard(s)	Disclose no information that must be kept confidential (e.g., proprietary data). Present the basis for not awarding to unsuccessful offerors, in terms of evaluation factors from the solicitation. Disclose other information required by the FAR. Provide any other information that will help the offeror(s) submit better proposals in the future. Tactfully answer all questions from vendor representatives.

Requests for Debriefings

☞ Offerors (including awardees — not just the unsuccessful) may request debriefings whenever award is on the basis of competitive proposals, whether or not the contracting officer conducted discussions and whether or not award was on price and price related factors alone. (§15.1004, FAC 90-31, Case 94-701)

Conducting Debriefings

☞ Debriefings can be by electronic or any other method acceptable to the contracting officer. (§15.1004, FAC 90-31, Case 94-701)

☞ Reaffirms that COs are responsible for chairing debriefings (unless the CO is unavailable, in which case the contracting officer may designate some other agency representative to serve as the chair with approval of an individual a level above the CO). Also reaffirms that “individuals actually responsible for the evaluations shall provide support”. (§15.1004, FAC 90-31, Case 94-701)

Debriefing Do's and Don'ts

☞ Previously, the FAR required only that the Government share its evaluation of the significant weaknesses or deficiencies in the offeror's proposal. In addition, the Government team must at minimum now provide information on:

- The overall evaluated cost and technical rating of the successful offeror and the debriefed offeror, if applicable (obviously this would not apply to debriefings of awardees).*
- The overall ranking of all offerors when any ranking was developed by the agency during the source selection.*
- A summary of the rationale for award.*
- For commercial end items delivered under the contract, the make and model of the awardee's deliverable.*

- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(* do not apply to A&E contracts)

Purpose -- to facilitate frank and open discussions leading hopefully better proposals on future procurements. In fact, the FAR never prohibited COs from providing the above information. The difference is that providing such information is now mandatory. COs will need to budget more time for debriefings. (§15.1004 and §36.607(b), FAC 90-31, Case 94-701)

☞ However, you still may NOT provide point by point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, you still may NOT reveal any information exempt from release under the Freedom of Information Act, including—

- Trade secrets.
- Privileged or confidential manufacturing processes and techniques.
- Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information. (§15.1004, FAC 90-31, Case 94-701)

☞ The Freedom of Information Act also protects the names of individuals providing reference information about an offeror's past performance. (§15.1004, FAC 90-26)

Summarizing the Debriefing for the Record

☞ You must prepare an “official” summary of the debriefing for the contract file. The FAR doesn’t detail the contents of this summary. It could take the form of a memorandum for the record. Include a copy of the script, if you have such. Also include a list of questions and how they were answered. (§15.1004, FAC 90-31, Case 94-701)

Availability of Information from Debriefings to Prospective Offerors

☞ If, within one year of the protested contract award, you issue a new solicitation or request for BAFOs, make the following information available to all prospective offerors:

- Information on the successful offeror’s proposal provided in any debriefings on the original award.
- Other nonproprietary information that would have been provided to the original offerors.

Purpose: To ensure that an offeror debriefed is not an offeror with an unfair competitive advantage.

You can comply with this policy merely by making available to all offerors an official written summaries of any one of the actual debriefings — after expunging proprietary information on the debriefed offeror's proposal. You can either provide this information with the new solicitation or simply notify all offerors that the information is available at a specified location. (§15.1004, FAC 90-31, Case 94-701)

FUNCTION: Protests

Contract Specialist Workbook, Unit of Instruction 52

(Look for changes resulting from new rules on Protests and Disputes).

FUNCTION: Ordering Against Contracts and Agreements

Contract Specialist Workbook, Unit of Instruction 56

☞ Contracting officers may use an “established electronic communications format” to place orders against Federal Supply Schedules. (§8.405-2, FAC 90-29, Case 91-104)

☞ Orders against indefinite contracts may be placed electronically, using electronic commerce methods. (§16.506, FAC 90-29, Case 91-104)

(Look for other changes related to placing task orders under single and multiple award task order contracts).

FUNCTION: Monitoring, Inspection, And Acceptance

Contract Specialist Workbook, Unit of Instruction 58

Part B: Compliance with Other Terms and Conditions

Duties	<ol style="list-style-type: none">1. Monitor compliance with the Contract Clauses in UCF §I (or equivalent clauses in contracts under FAR Part 12) by both the contractor and Government personnel.2. Perform any actions required of the contracting officer under the terms of the contract.3. Inform the contractor of any potential breaches.4. Resolve any compliance problems, where possible, without resorting to a formal contractual remedy.
Conditions	Given a contract, the contract administration plan, and any other related document referenced in the contract.
Overall Standard(s)	Properly enforce all contract and procedural requirements. Monitor actions of contracting officer representatives and other support personnel to preclude breaches by the Government. Identify and document potential breaches and report them to the contractor for correction as early as they occur. Accurately assess the impact of potential problems on performance and delivery requirements.

☞ When acquiring commercial items, contractors do NOT have to require their employees to individually certify that they are familiar with the Procurement Integrity Act and will report violations of the Act. (§3.104-9 and 52.203-8, FAC 90-30, Case 94-804]

(Look for other changes related to acquiring commercial items).

Part C: Protecting contractor whistleblowers.

Duty	Respond to complaints by contractor employees of reprisals for disclosing substantial violations of law.
Conditions	Given a contract and allegations by contractor employees of substantial violations of law.
Overall Standard(s)	Accurately describe the process for investigating complaints of reprisals for disclosures of “substantial violations of law” and potential remedies. Refer such complaints to the Inspector General.

✎ FAR Subpart 3.9 of the FAR implements the whistleblower protections for contractor employees established by sections 6005 and 6006 of the Federal Acquisition Streamlining Act (FASA). This subpart establishes remedies for contractor employees who are discharged, demoted or otherwise discriminated against as a reprisal for disclosing a substantial violation of law related to a contract to an “authorized official of an agency”. No clause is prescribed or necessary to make these remedies available to contractor employees.

For the purpose of this subpart, an “authorized official of an agency” means any officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract. If you are an authorized official under this subpart:

1. Document (in the form of memoranda for record) and report disclosures by contractor employees of substantial violations of law.
2. Advise such employees of their rights under FAR subpart 3.9.
3. Refer complaints of reprisals to the Inspector General. [FAC 90-30, Case 94-803]

Contractor employees may seek relief under FAR subpart 3.9 when they:

1. Have disclosed a substantial violation of law to:
 - A member of Congress,
 - An authorized official of an agency (e.g., an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement/contract), or
 - An authorized official of the Department of Justice.
2. As a result of the disclosure, can show that a reprisal action was taken against them.
3. Report the reprisals to the Inspector General (IG) of the agency that awarded the contract.

Subpart 3.9 establishes the following investigative process.

1. The contractor employee complains to the IG (the DoD IG for all Defense contracts).
2. The IG conducts an initial inquiry.
3. If the complaint merits further investigation, the IG notifies the complainant, contractor, and the Head of the Contracting Activity (HCA).
4. The IG investigates and reports its findings to agency head or designee, with copies of the “Report of Findings” to the complainant, contractor, and HCA.
5. Both the complainant and Contractor have opportunity to respond in writing to Report of Findings to the agency head or designee. Responses must be filed within 30 days (unless the agency head or designee extends the responsive time).

If the agency head or designee find for the complainant, the agency head or designee may direct the contractor to do any or all of the following.

1. Take affirmative action to abate the reprisal.
2. Reinstate the employee to the position held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would have applied if the reprisal had not been taken.
3. Pay all costs and expenses (including attorneys' fees and expert witnesses' fees) reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

Contractors can appeal the order (in terms of conformance with the law and FAR) to the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. This has to be done within 60 days after issuance of the order by the head of the agency or designee. If the contractor fails to comply with order, the agency head may request the Department of Justice to file action for enforcement in U.S. District Court for the district in which the reprisal occurred.

FUNCTION: Delays

Contract Specialist Workbook, Unit of Instruction 59

(Look for changes related to acquiring commercial items).

FUNCTION: Remedies

(Look for changes related to acquiring commercial items).

FUNCTION: Property Administration

Contract Specialist Workbook, Unit of Instruction 62

☞ Contractors may electronically reproduce standard inventory schedule forms, as long as they make no change to the name, content, or sequence of the data elements. Check to ensure that the electronic reproduction includes all essential elements of data and is signed. (§45.606-5, FAC 90-29, Case 91-104)

FUNCTION: Evaluating Contractor Performance

Contract Specialist Workbook, Unit of Instruction 63

☞ When work on the contract is completed, prepare an evaluation of contractor performance for each contract in excess of:

- \$1,000,000 beginning July 1, 1995,
- \$500,000 beginning July 1, 1996, and
- \$100,000 beginning January 1, 1998

Exceptions:

- Contracts awarded under Subparts 8.6 and 8.7.
- Construction and A&E contracts (see §36.201 and 36.604 for policies on recording performance under such contracts).

Also prepare interim evaluations for multiple year contracts as specified by the agency.

(FAR subpart 42.15, FAC 90-26)

☞ Past performance information is information that is relevant to future source selections on a contractor's actions under previously awarded contracts. Record information on such matters as the contractor's:

- Record of conforming to contract requirements and to standards of good workmanship.
- Record of forecasting and controlling costs.
- Adherence to contract schedules, including the administrative aspects of performance.
- History of reasonable and cooperative behavior and commitment to customer satisfaction.
- Business-like concern in general for the interest of the customer. (FAR subpart 42.15, FAC 90-26)

☞ Generally solicit input for the evaluations from the technical office, contracting office, and, where appropriate, end users of the product or service. (FAR subpart 42.15, FAC 90-26)

✎ Provide copies of the agency evaluation of the contractor's performance to the contractor as soon as practicable after completing the evaluation. Give the contractor at least 30 days to comment on the evaluation. If the parties disagree about the evaluation, refer the evaluation to a level above the contracting officer. However, the contracting agency makes the final decision. (FAR subpart 42.15, FAC 90-26)

✎ Retain copies of the evaluation, contractor response, and review comments (if any) and mark this information with the legend "Source Selection Information." Only release the evaluation to other Government personnel and the contractor whose performance is being evaluated. (FAR subpart 42.15, FAC 90-26)

✎ Destroy the evaluation within three years after completion of contract performance. (FAR subpart 42.15, FAC 90-26)

FUNCTION: Payment

Contract Specialist Workbook, Unit of Instruction 65

Part B. Payment of Indirect Costs

Certification of Indirect Cost Proposals

✎ Section 42.703-2 extends requirements for contractor certification of indirect cost rates (both billing and final) to the civilian agencies. Pursuant to 10 U.S.C. 2324(h), the Department of Defense already determines or negotiates contractor indirect cost rates on the basis of a certified proposal. Basically, contracting officers may not agree to billing or final indirect cost rates unless the contractor has certified (using the clause at 52.242-4, Certification of Indirect Costs) that:

- All proposed costs are allowable
- None are unallowable, AND
- All costs included in the proposal are properly allocable to Government contracts on the basis of a beneficial or causal relationship between the expenses incurred and the contracts to which they are allocated in accordance with applicable acquisition regulations.

[§42.703-1 and 52.242-4, FAC 90-31, Case 94-752]

✎ The head of the agency or designee may waive the certification when in the interest of the United States. However, they must put the reasons for the waiver in writing and make those reasons available to the public. For example, waivers might be appropriate for contracts with foreign governments, international organizations, State or local governments subject to OMB circular A-87, educational institutions subject to OMB circular A-21, and non-profit organizations subject to OMB circular A-122. [§42.703-1, FAC 90-31, Case 94-752]

☞ If necessary for continuation of the contract, contracting officers can unilaterally establish the rates if the contractor fails to certify its proposal for billing or indirect cost rates. [§42.703-1, FAC 90-31, Case 94-752]

Determining Final Indirect Cost Rates

☞ The FAR now requires that contracting officers use, not merely take into consideration, established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established. [§42.703-1, FAC 90-31, Case 94-754]

☞ If the contracting officer is responsible for determining final indirect cost rates, the FAR prohibits the contracting officer from resolving any questioned costs until obtaining—

- Adequate documentation on the costs; and
- The contract auditor's opinion on the allowability of the costs.

The FAR further advises contracting officers, whenever possible, to invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

Finally, the FAR adds a specific requirement that the contracting officer notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance. [§42.705-1, FAC 90-31, Case 94-754]

FUNCTION: Unallowable Costs

Contract Specialist Workbook, Unit of Instruction 66

Penalties for Submission of Unallowable Costs

☞ Sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 change the contract value threshold for assessment of penalties on unallowable costs from \$100,000 to \$500,000 and expand the coverage from the Department of Defense to all executive agencies. With the exception of the threshold value, the penalty provisions in the new law are the same as those implemented in the current Defense Federal Acquisition Regulation Supplement. [§42.709 and 52.242-3, FAC 90-31, Case 94-751]

☞ Contracting officers may assess penalties against contractors for including unallowable indirect costs in—

- Final indirect cost rate proposals; or
- The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

However, this policy only applies to contracts in excess of \$500,000 — and does NOT apply to fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items. [§42.709 and 52.242-3, FAC 90-31, Case 94-751]

☞ The penalty is equal to the amount of the disallowed costs plus interest on the paid portion, if any, of the disallowance. However, if the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is double that amount. Any of the following may constitute evidence of prior determinations of unallowability:

- A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency.
- A contracting officer final decision which was not appealed.
- A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance.
- A determination or agreement of unallowability under 31.201-6.

[§42.709 and 52.242-3, FAC 90-31, Case 94-751]

☞ Determinations of penalty amounts under paragraphs (d) and (e) of the clause at 52.242-3 are final decisions within the meaning of the Contract Disputes Act of 1978. The FAR contains precise instructions for determining the amount of the interest, issuing assessments, and waiving the penalty. [§42.709 and 52.242-3, FAC 90-31, Case 94-751]

Entertainment, Gift And Recreation Costs For Contractor Employees

☞ The costs of recreation are expressly unallowable with the exception of costs of company sponsored employee sports teams and employee organizations designed to improve company loyalty, team work, or physical fitness. The final rule retains the allowability of "wellness/fitness centers" found in the interim rule. The final rule eliminates the requirement that costs are only allowable to the extent that the net amount per employee must be reasonable for all categories of costs under this cost principle. [§31.205-13, FAC 90-31, Case 94-750]

☞ The costs of gifts are expressly unallowable (31.205-13(b)). However, this does not apply to costs which meet the definition of, and are properly accounted for as, compensation or recognition awards under §31.205-6. [§31.205-13, FAC 90-31, Case 94-750]

☞ FAR 31.205-14, "Entertainment Costs", incorporates the statutory wording of the Federal Acquisition Streamlining Act relating to the unallowability of entertainment costs under any other cost principle. This revision specifically disallows entertainment costs which some may have previously considered allowable. [§31.205-14, FAC 90-31, Case 94-750]

Lobbying and Conventions

☞ The costs of sponsoring conventions are unallowable when “the principal purpose of the event is other than dissemination of technical information or stimulation of production.” [§31.205-1 and 205-43, FAC 90-31, Case 94-754]

☞ The FAR imposes additional restrictions on the allowability of severance costs for foreign nationals employed outside the United States. Under certain conditions, for instance, all severance costs are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country.

However, FAR §37.113 allows waivers of the restrictions. [§31.205-6, 37.113, 52.237-8, and 52.237-9; FAC 90-31, Case 94-754]

☞ The costs of lobbying local Governments are unallowable, in the same respect that such costs are unallowable at the State and Federal levels. [§31.205-22, FAC 90-31, Case 94-754]

Statutory Unallowables

☞ Section 31.603 has been expanded to list 15 types of costs that are unallowable in statute. [§31.603 and 31.703, FAC 90-31, Case 94-754]

FUNCTION: Administering Contract Financing Terms and Conditions

Contract Specialist Workbook, Unit of Instruction 69 (formerly “Progress Payments”)

(Look for changes related to new rules for financing acquisitions of commercial and non-commercial items).

FUNCTION: Defective Pricing

Contract Specialist Workbook, Unit of Instruction 73

(Look for changes resulting from new rules related to the Truth in Negotiations Act).

FUNCTION: Contract Modifications

Contract Specialist Workbook, Unit of Instruction 75

(Look for changes related to acquiring commercial items).

FUNCTION: Termination

Contract Specialist Workbook, Unit of Instruction 76

(Look for changes related to acquiring commercial items).

FUNCTION: Claims

Contract Specialist Workbook, Unit of Instruction 78

Duty	Analyze and recommend settlement positions and prepare a Contracting Officer's decision.
Conditions	Given a contract and a claim from a contractor.
Overall Standard(s)	Correctly determine the validity of the claim and prepare a proper and complete decision. Protect the Government's interests while treating the contractor fairly and equitably within the terms of the contract.

✎ A new exception to full and open competition allows agencies to acquire the services of an expert for any current or anticipated litigation or dispute. Such authority is necessary to support ADR. For ADR to work, the Government requires authority to essentially “name-request” an unbiased third party, highly regarded as an expert in the field, who is agreeable to both parties. (Case 94-701)

(Look for other changes resulting from new rules on Protests and Disputes).